Supreme Court, U.S.
FILED
JAN 28 2002
OFFICE OF THE CLERK

(2)

No. 01-916

In The

Supreme Court of the United States

MARSHA MILLER,

Petitioner,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

In addition to the parties listed in the caption of this case, one other party warrants mention. The Texas Commissioner of Education was a Defendant/Appellee in the proceedings below. The judgment entered by the District Court affirmed the Commissioner of Education's decision upholding HISD's decision to terminate Petitioner's employment. The opinion entered by the First Court of Appeals of the State of Texas also affirmed the Commissioner's decision. Marsha Miller included the Commissioner as a Respondent to her Petition for Review to the Texas Supreme Court, but did not identify the Commissioner as a Respondent to her Petition for Writ of Certiorari. The Texas Commissioner of Education is an interested party to this case.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Houston Independent School District ("HISD") respectfully requests that the Court deny Petitioner Marsha Miller's Petition for a Writ of Certiorari. In her appeals to the First Court of Appeals of the State of Texas and to the Texas Supreme Court, Petitioner never challenged the validity of a Texas statute on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States. Likewise, Petitioner never set up or claimed any title, right, privilege, or immunity under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. Because of Petitioner's failure in the state courts to raise a federal question and failure to claim any right under the Constitution, this Court does not have jurisdiction to decide this Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner was a school counselor employed by HISD under a continuing contract. Under the terms of her contract and policy of HISD's Board of Education, Petitioner could be assigned or reassigned duties. In July 1997, Petitioner was reassigned from one high school to another within HISD.

For personal reasons, Petitioner refused to accept her new assignment. Petitioner initiated the HISD employee grievance process in an attempt to have her reassignment changed. Prior to and during the three months her grievance was pending, Petitioner – unilaterally and without authorization – failed to report to her work assignment.

Because of this unexcused failure to show up to work for three months, HISD proposed to terminate Petitioner's employment contract. An independent hearing examiner first heard the proposed termination. The hearing examiner found that the Petitioner's failure to show up for work for three months was excusable and legally did not constitute good cause for her termination.

HISD's Board of Education disagreed with the hearing examiner's interpretation of its policy. After correcting the hearing examiner's mistaken interpretations, the Board voted to terminate Petitioner's employment.

Petitioner appealed the Board's termination decision to the Commissioner of Education. The Commissioner found that Petitioner's failure to report for work for three months constituted good cause for her termination and affirmed the Board's decision.

Petitioner appealed the Commissioner's decision to the state District Court. The District Court affirmed the Commissioner's decision. Petitioner appealed the Commissioner's decision to the First Court of Appeals. The First Court of Appeals affirmed the Commissioner's decision. Petitioner filed a Petition for Review with the Texas Supreme Court in an attempt to challenge the decision of the First Court of Appeals. The Texas Supreme Court denied the Petition for Review.

SUMMARY OF THE ARGUMENT

In an attempt to obtain certiorari review, Petitioner states this Court has jurisdiction of this Petition for a Writ

of Certiorari under 28 U.S.C. § 1257(a), which provides for United States Supreme Court review of final judgments when a state has deprived a citizen of a right, privilege, or immunity guaranteed by the United States Constitution. Petitioner's portrayal of her argument in the Texas appellate courts, however, ignores the plain meaning of 28 U.S.C. § 1257(a) and ignores the fact that Petitioner never set up or claimed a title, right, or privilege under the United States Constitution in the First Court of Appeals or the Texas Supreme Court. Therefore, this Court is without jurisdiction to decide this Petition for a Writ of Certiorari.

ARGUMENT

Section 1257(a) of the United States Code provides the requirement for this Court's jurisdiction.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). This statute requires that the federal question presented to the Court must have been first presented to the state court. The Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997) (per curiam); *see Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992).

Further, Petitioner has the burden of showing that the issue raised in the Petition for a Writ of Certiorari was properly presented to the state court that rendered the decision the Supreme Court has been asked to review. *See Adams*, 520 U.S. at 86, 117 S. Ct. at 1029. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Id.*; *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474 (1987). The Court has specifically stated that the aggrieved party bears the burden of defeating this assumption. *See Adams*, 520 U.S. at 87, 117 S. Ct. at 1029. The Petitioner's burden is to demonstrate that the state court had " 'a fair opportunity to address the federal question that is sought to be presented here.' " *Id.* (quoting *Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed. 2d 392 (1981)).

The Court in *Adams* listed several different ways the petitioner could overcome this burden. The Court stated that in past cases it has focused on the petitioner's need to establish that the claim was raised at the time and in the manner required by state law. *See Adams*, 520 U.S. at

87, 117 S. Ct. at 1029; *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78, 108 S. Ct. 1645, 1650, 100 L. Ed. 2d 62 (1988); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S. Ct. 2296, 2301, n.3, 76 L. Ed. 2d 497 (1983); *Beck v. Washington*, 369 U.S. 541, 549-54, 82 S. Ct. 955, 959-63, 8 L. Ed. 2d 98 (1962). The Court also stated that in past cases it has focused on the petitioner's need to persuade the Court that "the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment." *Adams*, 520 U.S. at 87, 117 S. Ct. at 1030. The Court in *Adams* further stated that it has described the petitioner's burden "as involving the need to demonstrate that it presented the particular claim at issue here with 'fair precision and in due time.' " *Adams*, 520 U.S. at 87, 117 S. Ct. at 1030 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184 (1928) and citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85, n.9, 100 S. Ct. 2035, 2043, n.9, 64 L. Ed. 2d 741 (1980)).

Petitioner has not demonstrated that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Adams*, 520 U.S. at 87, 117 S. Ct. at 1029. Petitioner argues that the Due Process Clause of the Fourteenth Amendment prevents HISD from terminating her, prevents HISD from promulgating allegedly vague grievance procedures, and prevents HISD from allegedly failing to consider a grievance in a timely manner. However, Petitioner makes no reference in her Petition for a Writ of Certiorari to an instance in either the First Court of Appeals or the Texas Supreme Court where she raised a federal question or a Fourteenth Amendment challenge.

Petitioner has done nothing to demonstrate that she complied with the applicable state rules for raising her federal due process claims before the First Court of Appeals or the Texas Supreme Court. Petitioner also has failed to explain why the failure to comply with those state rules would not be an adequate and independent ground for the state court to disregard that claim. Additionally, Petitioner has failed to demonstrate that she presented her federal claim with fair precision and due time. Because Petitioner has failed to carry her burden of showing that the claims she raised here were properly before the Texas courts, this Court is without jurisdiction to address the questions presented.

The explanation for Petitioner's failure to carry her burden of showing that the claims she now raises were properly before the Texas courts is that a federal issue was never presented to the First Court of Appeals or to the Texas Supreme Court. A review of the opinion issued by the First Court of Appeals confirms that a due process claim under the Fourteenth Amendment was never addressed. *See Miller v. Houston Indep. Sch. Dist.*, 51 S.W.3d 676 (Tex. App. – Houston [1st Dist.] 2001, pet. denied).

According to the Table of Authorities, attached in HISD's appendix as App. 2-5, the Fourteenth Amendment was not cited as an authority to challenge Petitioner's termination. The only federal matter raised in the First Court of Appeals was a federal case cited by the Petitioner to support an evidentiary challenge. The fact that this case was cited in the First Court of Appeals does not raise a federal question. "The discussion of 'a federal

case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.' " *Adams*, 520 U.S. at 88, 117 S. Ct. at 1030 (quoting *Board of Directors Int'l*, 481 U.S. at 550 n.9, 107 S. Ct. at 1948 n.9).

According to the Issues Presented for Review, attached in HISD's appendix as App. 5-8, from Petitioner's appellate briefing in the First Court of Appeals, the due process challenges raised in the present Petition were not presented to that court. Petitioner presented eleven issues for review to the First Court of Appeals. Each of these eleven issues challenged actions taken by the Commissioner of Education that Petitioner alleged were in violation of the Texas Education Code. Not once did Petitioner present a due process challenge to the First Court of Appeals.

Likewise, a review of the Index of Authorities and the Issues Presented for Review, attached in HISD's appendix as App. 10-14, from Petitioner's Petition for Review in the Texas Supreme Court further shows that the due process claims raised in the Petition for Writ of Certiorari were not presented to the Texas Supreme Court. The Index of Authorities shows that neither the Fourteenth Amendment nor any federal laws or cases were presented to the Texas Supreme Court as authority for granting the Petitioner's Petition for Review. The Issues Presented for Review show that eleven issues were raised in the Petition for Review to the Texas Supreme Court. However, these were the same eleven issues raised in the First Court of Appeals. These eleven issues did not present a challenge to the appellate court's decision based on the Fourteenth Amendment or based on any other

federal law. Because Petitioner did not present her due process claims to the Texas courts, this Court is without jurisdiction to review the judgment on the Petition for a Writ of Certiorari.

Further, this Court should deny the Petition because Petitioner has not complied with this Court's Rules. Rule 14(g)(i) of the Supreme Court's rules detailing the requirements of the contents of a Petition for a Writ of Certiorari provides:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Rule 14(g)(i). Because she fails in her Petition to specify references to any federal claims in the proceedings in both the court of first instance and in the appellate courts, Petitioner has failed to comply with this Rule. As detailed above, Petitioner failed to present specific references of federal claims in the underlying state courts because these federal claims are new claims that have been raised for the first time with this Court. Thus, the Court should

deny the Petition because the Court lacks jurisdiction to review the judgment on a writ of certiorari.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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NO. 1-99-1437-CV

IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS HOUSTON, TEXAS

MARSHA MILLER, Appellant

v.

THE HOUSTON INDEPENDENT SCHOOL DISTRICT AND THE TEXAS COMMISSIONER OF EDUCATION, Appellees

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On Appeal from the 133rd District Court
Of Harris County, Texas
Trial Court Cause No. 98-45316

APPELLANT'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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* * *

ISSUE ONE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection Finding of Fact 10 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE TWO PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection of Finding of Fact 34 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE THREE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's modification of Finding of Fact 39 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE FOUR PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's modification of Finding of Fact 48 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE FIVE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection Finding of Fact 52 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE SIX PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's changes to a portion of the Recommendation of the Certified Independent Hearing Examiner and adoption of a fragment thereof as Finding of Fact 55, and wrongfully rejected the remainder of the recommendation, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the Board cannot make independent, additional findings of fact, and the Recommendation was supported by substantial evidence.

ISSUE SEVEN PRESENTED FOR REVIEW

The Commissioner of Education and the Houston Independent School District Board of Trustees erroneously disregarded the Independent Hearing Examiner's Discussion section which was a Finding of Fact in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the Discussion was supported by substantial evidence.

ISSUE EIGHT PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection Conclusion of Law 2 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the conclusion was an ultimate finding of ultimate fact, and was supported by substantial evidence, or, in the alternative, declared a legal effect.

ISSUE NINE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's modification of Conclusion of Law 3 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the conclusion was an ultimate finding of fact, and was supported by substantial evidence, or, in the alternative, declared a legal effect.

ISSUE TEN PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's changes and redesignation as a conclusion of law to Finding of Fact 7 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the change and redesignation was arbitrary and capricious, unlawful, and the Board was without authority to reclassify the finding as a Conclusion of Law.

ISSUE ELEVEN PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's redesignation as a Conclusion of Law and subsequent rejection of Finding of Fact 9 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the change and redesignation was arbitrary and capricious, unlawful, and the Board was without authority to reclassify the finding as a Conclusion of Law.

NO. _____

SUPREME COURT OF TEXAS
AUSTIN, TEXAS

MARSHA MILLER, Petitioner

v.

THE HOUSTON INDEPENDENT SCHOOL DISTRICT AND THE TEXAS COMMISSIONER OF EDUCATION, Respondents

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No. 1-99-1437-CV
First Court of Appeals at Houston, Texas

On Appeal from the 133rd District Court
Of Harris County, Texas
Trial Court Cause No. 98-45316

PETITION FOR REVIEW

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ORAL ARGUMENT REQUESTED

* * *

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* * *

ISSUE ONE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection of Finding of Fact 10 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE TWO PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection of Finding of Fact 34 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE THREE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's modification of Finding of Fact 39 of the Certified Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE FOUR PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's modification of Finding of Fact 48 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303, because the original finding was supported by substantial evidence.

ISSUE FIVE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection of Finding of Fact 52 of the Certified Independent Hearing Examiner in violation of TEX. EDUC.

CODE secs. 21.259 and 21.303 because the original finding was supported by substantial evidence.

ISSUE SIX PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's changes to a portion of the Recommendation of the Certified Independent Hearing Examiner and adoption of a fragment thereof as Finding of Fact 55, and wrongfully rejected the remainder of the recommendation, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the Board cannot make independent, additional findings of fact, and the Recommendation was supported by substantial evidence.

ISSUE SEVEN PRESENTED FOR REVIEW

The Commissioner of Education and the Houston Independent School District Board of Trustees erroneously disregarded the Independent Hearing Examiner's Discussion Section which was a Finding of Fact in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the Discussion was supported by substantial evidence.

ISSUE EIGHT PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's rejection of Conclusion of Law 2 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the conclusion was

an ultimate finding of fact, and was supported by substantial evidence, or, in the alternative, declared a legal effect.

ISSUE NINE PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's modification of Conclusion of Law 3 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the conclusion was an ultimate finding of fact, and was supported by substantial evidence, or, in the alternative, declared a legal effect.

ISSUE TEN PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's changes and redesignation as a conclusion of law to Finding of Fact 7 of the Certified Independent Hearing Examiner in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the change and redesignation was arbitrary and capricious, unlawful, and the Board was without authority to reclassify the finding as a Conclusion of Law.

ISSUE ELEVEN PRESENTED FOR REVIEW

The Commissioner of Education erroneously affirmed the Houston Independent School District Board of Education's redesignation as a Conclusion of Law and subsequent rejection of Finding of Fact 9 of the Certified

Independent Hearing Examiner, in violation of TEX. EDUC. CODE secs. 21.259 and 21.303 because the change and redesignation was arbitrary and capricious, unlawful, and the Board was without authority to reclassify the finding as a Conclusion of Law.